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A Judge's Failure to Recuse Himself from a Case in Which One of the Parties Donated a Substantial Amount of Money to His Political Campaign Violates the Due Process Clause - *Caperton v. A. T. Massey Coal Co.*

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A Judge's Failure To Recuse Himself From A Case In Which One Of The Parties Donated A Substantial Amount of Money To His Political Campaign Violates The Due Process Clause. *Caperton v. A.T. Massey Coal Co.*

CONSTITUTIONAL LAW—DUE PROCESS—JUDGES—IMPARTIALITY—The United States Supreme Court held that a judge's failure to recuse himself from a case in which an interested party had donated a substantial amount of money to the judge's political campaign violated the Due Process Clause because of the innate probability of bias.

Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).

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I. THE FACTS AND PROCEDURAL HISTORY OF *CAPERTON*

Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales ("Caperton") sued A.T. Massey Coal Co. and its affiliates ("Massey") in Boone County, West Virginia.[1] The heart of Caperton's claim was that Massey had tortiously ruined Caperton's businesses.[2] Massey was found "liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations" for its actions against Caperton.[3] The jury returned a $50 million verdict in favor of Caperton.[4]

After the trial court rendered its judgment, but prior to Massey's appeal to the Supreme Court of Appeals of West Virginia, judicial elections were held in West Virginia.[5]

Don Blankenship, chairman and high-ranking officer in the Massey Corporation, was aware that the Supreme Court of West Virginia would hear the appeal in the case.[6] Blankenship decided to support Brent Benjamin, the attorney running against the incumbent Justice Warren McGraw, for a position on Supreme Court of West Virginia.[7] To support Benjamin, Blankenship donated $1,000 to his campaign committee,[8] and also donated approximately $2.5 million to a political organization that supported Benjamin.[9] In addition to these contributions, Blankenship spent

1. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2256 (2009).
2. *Caperton*, 129 S. Ct. at 2257.
3. *Id.* The trial court found that Massey "intentionally acted in utter disregard of [Caperton's] rights and ultimately destroyed [Caperton's] businesses because, after conducting cost-benefit analysis, [Massey] concluded it was in its financial interest to do so." *Id.*
4. *Id.*
5. *Id.*
6. *Id.* Blankenship was Massey's chairman, chief executive officer, and president. *Id.*
7. *Caperton*, 129 S. Ct. at 2257.
8. *Id.* The West Virginia Code of State Rules limits contributions to political campaigns to $1,000. W. VA. CODE R. § 146-3-5.2 (2008).
9. *Caperton*, 129 S. Ct. at 2257. Blankenship donated the money to a political organization called "And For The Sake Of The Kids," which was formed under 26 U.S.C. § 527

$500,000 on various advertising methods in order to support Benjamin.[10] The money contributed by Blankenship far exceeded any other Benjamin supporter or contributor.[11] In the election, Benjamin defeated incumbent Justice McGraw by more than 47,000 votes.[12]

Before Massey filed the petition for appeal to the Supreme Court of West Virginia, Caperton tried to have Justice Benjamin removed from hearing the case.[13] Justice Benjamin found no reason to remove himself from hearing the case, however, and denied the motion.[14] The Supreme Court of West Virginia granted review of Massey's petition challenging the $50 million verdict entered by the trial court.[15] In the West Virginia Supreme Court decision, the majority agreed that Massey's prior actions favored a judgment against them, but they overturned the trial court on other grounds.[16] The two dissenting justices authored separate opinions in which they expressed deep concerns with the majority's holding.[17]

After Caperton moved for a rehearing, both Caperton and Massey filed recusal motions to have three of the five justices removed

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(2006) (requiring political organizations to meet certain requirements in order to be tax exempt). *Caperton*, 129 S. Ct. at 2257.

10. *Id.* The $500,000 was used for direct mailings, letters soliciting donations, and advertisements on television and in the newspapers. *Id.*

11. *Id.* The $3 million Blankenship contributed were more than "the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee." *Id.*

12. *Caperton*, 129 S. Ct. at 2257. Benjamin received 382,036 votes (53.3%) and McGraw received 334,301 votes (46.7%). *Id.*

13. *Id.* The theory upon which Caperton based his motion was that if Justice Benjamin would hear the case it would violate the Due Process Clause of the United States Constitution and the West Virginia Code of Judicial Conduct. *Id.* The Due Process Clause states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

14. *Caperton*, 129 S. Ct. at 2257. According to Benjamin, he "carefully considered the bases and accompanying exhibits proffered by the movants." *Id.* at 2258 (quoting Joint Appendix at 336a-337a, *Caperton*, 129 S. Ct. 2252 (No. 08-22)). He found "no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial." *Id.* at 2258 (quoting Joint Appendix, *supra*, at 336a-337a).

15. *Id.* at 2258.

16. *Id.* The $50 million verdict was reversed in November of 2007. *Id.* The majority based their decision on a forum selection clause found in a contract where Massey was not a party, and claimed that the suit was barred by res judicata because of another judgment, not in West Virginia, where Massey was also not a party. *Id.*

17. *Caperton*, 129 S. Ct. at 2258. Justice Starcher claimed that "the majority's opinion is morally and legally wrong," and Justice Albright claimed the majority "misappl[ied] the law and introduced sweeping new law into our jurisprudence that may well come back to haunt us." *Id.* (quoting Joint Appendix, *supra* note 14, at 420a-422a).

from the rehearing.[18] Justice Benjamin denied the recusal motion, but the two other justices recused themselves.[19] After granting the rehearing, Justice Benjamin, acting as Chief Justice, replaced Justices Maynard and Starcher with Judges Cookman and Fox.[20] In a three-to-two decision in April 2008, the court again reversed the lower court's $50 million judgment.[21]

In August 2008, Caperton filed a petition for writ of certiorari to the Supreme Court of the United States based on a violation of the Due Process Clause.[22] Justice Benjamin, who had joined in the majority opinion, filed a separate concurring opinion after the petition for writ of certiorari was filed.[23] In the concurrence, Justice Benjamin cited the law under which a judge is required to recuse himself so as to not violate due process, and why he thought there was no need for him to do so in this case.[24]

II. THE UNITED STATES SUPREME COURT OPINIONS IN *CAPERTON*

A. *Justice Kennedy's Majority Opinion*

The Supreme Court of the United States granted certiorari to settle the due process issue of when an elected judge, who received sizeable campaign contributions from a party, should recuse himself from hearing that party's case.[25] In the majority opinion, Justice Kennedy recognized that in most instances the Constitution does not mandate recusal, and that it generally falls upon the leg-

18. *Id.* Recusal is the "removal of oneself as judge or policy-maker in a particular matter, esp. because of a conflict of interest." BLACK'S LAW DICTIONARY 1390 (9th ed. 2009).

19. *Id.* The three justices were Justice Maynard, who granted the motion, Justice Starcher, who granted the motion, and Justice Benjamin, who denied the motion despite being urged to grant it by Justice Starcher. *Id.* Photographs had been released showing Justice Maynard vacationing with Blankenship in the French Riviera. *Id.* In Justice Starcher's recusal memorandum he stated that "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this court." *Id.* (quoting Joint Appendix, *supra* note 14, at 459a-460a.

20. *Id.*

21. *Id.* Justice Benjamin, Justice Davis and Judge Fox voted to overturn the verdict and Justice Albright and Judge Cookman dissented. *Id.*

22. *Caperton*, 129 S. Ct. at 2259.

23. *Id.*

24. *Id.* Justice Benjamin stated that he did not have any "direct, personal, substantial, pecuniary interest" in the case. *Id.* (quoting Transcript of Record at 677a, *Caperton*, 679 S.E.2d at 223 (No. 33350)). He did not want to "adopt a standard merely of appearances" which "seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day-a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations." *Id.* (quoting Joint Appendix, *supra* note 14, at 692a,).

25. *Id.* at 2256.

islature to establish the grounds for recusal.[26] Justice Kennedy, however, did acknowledge that in certain limited instances the common-law mandated recusal; he further observed that U.S. courts incorporated those common-law principles, as well as other non-common-law principles, in the Due Process Clause.[27]

Justice Kennedy then outlined the Supreme Court's history of when it has required recusal.[28] He noted that the Court has required recusal in two situations.[29] The first situation incorporated the common-law rule and occurred when the judge had a financial stake in the outcome of the case.[30] Based on those cases, the Court held that due process requires disqualification of a judge when monetary interests in the outcome may entice him to favor one side in the dispute.[31] The second situation, which extended beyond the common-law principle, required recusal when a judge had participated in a prior proceeding related to the case.[32] One instance involved a judge who acted as the grand jury and then proceeded to serve as the trial judge.[33] Another situation involved a judge who convicted a defendant of criminal contempt where the judge himself was the basis for the charge.[34] Justice Kennedy noted that in these situations the Court did not consider whether the judge had actual bias, but rather whether the circumstances created a strong possibility for bias by the judge.[35]

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26. *Id.* at 2259. Justice Kennedy stated that "most matters relating to judicial disqualification [do] not rise to a constitutional level." *Id.* (citing FTC v. Cement Inst., 333 U.S. 683, 702 (1948)). Justice Kennedy was joined in the majority opinion by Justices Stevens, Souter, Ginsburg, and Breyer. *Id* at 2256. Chief Justice Roberts dissented and was joined by Justices Scalia, Thomas, and Alito. *Id.* Justice Scalia filed a separate dissenting opinion. *Id.*

27. *Caperton*, 129 S. Ct. at 2259.

28. *Id.*

29. *Id.*

30. *Id.* at 2259-60. Justice Kennedy cited Tumey v. Ohio, 273 U.S. 510 (1927), "[t]he early and leading case on the subject." *Caperton*, 129 S. Ct. at 2259. In it, the Court found that due process requires a judge to recuse himself when he has "a direct, personal, substantial, pecuniary interest" in the case. *Id.*

31. *Id.* at 2260-61. "The proper constitutional inquiry is 'whether sitting on the case . . .' would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Id.* at 2261. (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986)).

32. *Caperton*, 129 S. Ct. at 2261.

33. *Id.* (discussing In re Murchison, 349 U.S. 133 (1955)).

34. *Id.* at 2262 (discussing Mayberry v. Pennsylvania, 400 U.S. 455 (1971)).

35. *Id.* "The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.*

After detailing the history of due process and recusal, Justice Kennedy returned to the issue in this case.[36] Justice Kennedy noted that the Court had never reviewed a case involving bias within the context of judicial elections.[37] On this point he acknowledged that Caperton argued that the prior due process cases, which required judicial recusal, presented analogous situations to this one because Justice Benjamin would feel indebted to rule in Blankenship's favor.[38]

The majority stated that the Due Process Clause should not require disqualification based on subjective observations.[39] Rather, the Court established the proper inquiry as whether the circumstances objectively showed a high propensity to favor one side.[40] Based on this objective standard, the Court concluded that an unconstitutional risk of bias existed when a party exercised substantial influence over what judge heard their case.[41] In the context of judicial elections, the majority opined, substantial influence is not determined by the amount the individual donates, but rather how much that amount compares to the total spent throughout the campaign, and whether that contribution may have influenced the results.[42]

Applying those objective standards to this case, Justice Kennedy reasoned that the circumstances surrounding Justice Benjamin's election would result in the questioning of his impartiality, even if the Court could not determine whether Blankenship's actions led to Justice Benjamin's election.[43] Indeed, Justice Kennedy stated that determining why one candidate wins an election is nearly as impossible as determining someone's personal thoughts, and this difficulty makes an objective standard more workable than a subjective one in the context of judicial elections.[44]

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36. *Id.*
37. *Caperton*, 129 S. Ct. at 2262.
38. *Id.*
39. *Id.* at 2263.
40. *Id.*
41. *Id.* at 2263-64.
42. *Caperton*, 129 S. Ct. at 2264. Justice Kennedy wrote that the question centered on the size of the contribution in comparison to the "total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.*
43. *Id.* at 2264. Blankenship contributed three million dollars in favor of Justice Benjamin, exceeding by three hundred percent the amount spent by Benjamin's own campaign committee. *Id.* Caperton argued that Blankenship spent one million dollars more than the combined total of Benjamin's opposition. *Id.*
44. *Id.* The majority noted the defenses that both Massey and Justice Benjamin raised about why Benjamin won the election, but did not find them persuasive in deciding this

The majority held that although the previous judicial disqualification cases failed to provide similar facts, the rules used in those cases could still be applied here.[45] Justice Kennedy reasoned that, given all the circumstances, Blankenship's support sufficiently jeopardized the impartiality of Justice Benjamin, and due process required his disqualification.[46] The majority also questioned Blankenship's motives for the expenditures during the judicial election without implying that there was a quid pro quo type of agreement between Benjamin and Blankenship.[47] The majority concluded that a substantial risk of bias existed in this case.[48] Therefore, it determined that the Due Process Clause required recusal in this case, despite the failure of Justice Benjamin to find any bias.[49]

Prior to concluding, the majority addressed the consequences of requiring disqualification of a judge under the Due Process Clause without some definitive proof of partiality.[50] Justice Kennedy reasoned that although the situation at issue was distinguishable from any prior case, those earlier cases still provided some insight into the Court's decision in this case.[51] Because the issue tested the outermost bounds of the Constitution, the Court needed to develop a new way to review these cases using independent standards.[52] By using the prior disqualification cases as a guide, the Court adopted an objective standard to settle these rare instances.[53]

The majority did not foresee any rippling effects from adopting their objective standard, especially since the majority of states already have measures in place to abolish the slightest amount of partiality.[54] Justice Kennedy noted that states may choose to

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case. *Id.* Massey claimed that Blankenship's support did not cause Benjamin's victory; he was elected by a majority of West Virginia voters, he was supported by all the major newspapers but one, and a poor speech by Justice McGraw cost him the election. *Id.* Justice Benjamin claimed his campaign themes as well as Justice McGraw's shortcomings were the reason for his victory. *Id.*

45. *Id. See Tumey*, 273 U.S. at 532; Withrow v. Larkin, 421 U.S. 35, 47 (1975).

46. *Caperton*, 129 S. Ct. at 2264.

47. *Id.* at 2265.

48. *Id.*

49. *Id.* Justice Kennedy noted that Justice Benjamin "did undertake an extensive search for actual bias." *Id.*

50. *Id.*

51. *Caperton*, 129 S. Ct. at 2265. *See Tumey*, 273 U.S. at 532; *Withrow*, 421 U.S. at 47 (1975).

52. *Caperton*, 129 S. Ct. at 2265.

53. *Id.* "[T]he Court dealt with extreme facts that created an unconstitutional probability of bias that 'cannot be defined with precision.'" *Id.* (quoting *Lavoie*, 475 U.S. 813).

54. *Id.* at 2265.

adopt stricter standards than those needed to meet due process.[55] The majority reasoned that because of these state standards, along with the extreme circumstances addressed by the cases relying on the Due Process Clause, only a few disputes will actually require turning to the Constitution.[56]

Based on the majority's reasoning, the Court determined that Justice Benjamin's failure to recuse himself violated Caperton's due process rights.[57] The Court, therefore, reversed the decision of the Supreme Court of Appeals of West Virginia and sent the case back to the lower court.[58]

B. Chief Justice Roberts' Dissenting Opinion

Chief Justice Roberts dissented. Although he agreed with the majority regarding the importance of unbiased and impartial judges, he explained that the majority expanded a judicial doctrine further than the law has ever required, and such policy decisions should be left to the lawmakers, not the courts.[59] The Chief Justice argued that the majority created an unworkable rule that would only lead to more litigation and a decrease in the public's faith in the judiciary.[60]

The Chief Justice believed that it was well settled as to when due process required recusal.[61] His dissent argued that there could be some semblance of partiality in almost every case, including those where a friendly relationship exists or even where the judge and a party share the same religion.[62] Out of those cases, though, the Chief Justice opined that very few actually present due process violations, especially because judges are generally recognized as fair adjudicators.[63] Chief Justice Roberts then listed forty problematic questions that he believed courts would need to

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55. *Id.* at 2267. States can "adopt recusal standards more rigorous than due process requires." *Id.* (quoting Republican Party of Minn. v. White, 536 U.S. 765 (2002)).

56. *Id.*

57. *Caperton*, 129 S. Ct. at 2267.

58. *Id.*

59. *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting). Joining Chief Justice Roberts in the dissent were Justice Scalia, Justice Thomas and Justice Alito. *Id.*

60. *Id.*

61. *Id.* Chief Justice Roberts noted that the federal Due Process Clause has only required recusal when "the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts." *Id.*

62. *Id.* at 2268. Chief Justice Roberts list the factors as: "friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations." *Id.*

63. *Caperton*, 129 S. Ct. at 2268 (Roberts, C.J., dissenting).

answer based on the majority's holding.[64] The Chief Justice noted that the majority did not create a standard to which lower courts could look for answers, and that an unclear standard such as this one may account for why the Court had never mandated recusal using such terms in the past.[65]

Chief Justice Roberts further noted that despite this issue testing the outermost realm of recusal, the law should not change simply to fit the situation.[66] As with unclear standards in the past, the dissent argued that the majority decision created more problems,[67] and the Court would have to continually revisit this decision.[68]

The Chief Justice concluded by analyzing the contributions made by Blankenship in this case, believing that the Court could not conclusively infer any unusual circumstances given the facts surrounding this case.[69] Justice Benjamin exercised no control over a vast majority of Blankenship's spending, the dissent noted, and Blankenship had donated large sums of money toward political campaigns in the past.[70] Also, many other explanations existed for Justice Benjamin's victory, including faults by his opponent.[71]

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64. *Id.* at 2269-72. Some of the questions were: "How much money is too much money?" *Id.* at 269. "Does what is unconstitutional vary from state to state?" *Id.* at 270. "What is the proper remedy?" *Id.* at 271.

65. *Id.* at 2272. The Chief Justice noted that "probability" or "appearance" of bias has never been used in the common law or by the Court to require judicial disqualification. *Id.*

66. *Id.* Chief Justice Roberts stated that "[h]ard cases make bad law." *Id.*

67. *Id.* at 2274. "It is an old cliché, but sometimes the cure is worse than the disease." *Id.*

68. *Caperton*, 129 S. Ct. at 2272-73 (Roberts, C.J., dissenting). Chief Justice Roberts cited the example of United States v. Halper, 490 U.S. 435 (1989) and the subsequent case of Hudson v. United States, 522 U.S. 93 (1997). *Caperton*, 129 S. Ct. at 2272-73 (Roberts, C.J., dissenting). In *Halper* the court held that a civil penalty could violate the Double Jeopardy Clause in extreme cases, and eight years later in *Hudson* the Court addressed the problems created by *Halper*. *Id.* "It is an old cliché, but sometimes the cure is worse than the disease." *Id.*

69. *Id.*

70. *Id.* at 2273-74.

71. *Id.* at 2274. Justice Benjamin defeated his opponent by a seven-point margin, there was a speech made by Benjamin's opponent that was described as "deeply disturbing," his opponent did not give interviews or do debates, and only one newspaper did not support Benjamin. *Id.* "Justice Benjamin just might have won because the voters of West Virginia thought he would be a better judge than his opponent." *Id.*

C. *Justice Scalia's Dissenting Opinion*

Justice Scalia authored his own dissent to explain his discomfort with the rule the majority created.[72] Justice Scalia agreed with Chief Justice Roberts's dissent, but he further explained that the Due Process Clause cannot be used to solve every claim, which is what he believed the majority was trying to do in this case.[73] Justice Scalia concluded by stating that the Court should not have heard this claim in the first place.[74]

III. THE ORIGIN AND HISTORY OF THE PRINCIPLE OF JUDICIAL DISQUALIFICATION AND PRECEDENT LEADING TO *CAPERTON*

A. *The Common Law*

The requirement of judicial disqualification is an old and simple principle deeply rooted in the common law.[75] Originating with the common law maxim that "no man is allowed to be a judge in his own cause," the rule was not flexible, and it pertained to the king as well as a judge at any level.[76] This maxim required courts to set aside decisions when a judge had any interest, or even an appearance of an interest, in the case.[77] This maxim was clarified as early as 1610, in what is commonly called *Dr. Bonham's Case*.[78] In that case, Sir Edward Coke found the Royal College of Physicians, who participated as judges and parties in the same cases while receiving half of all the fines they issued, ineligible to decide the issue.[79] In 1613, Coke further expanded this doctrine when he held that the mayor of Hereford should not have adjudicated a

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72. *Caperton*, 129 S. Ct. at 2274 (Scalia, J., dissenting).

73. *Id.* at 2272. Justice Scalia stated: "Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution." *Id.*

74. *Id.* Justice Scalia hinted that some issues cannot be solved by the Court and that "is why [they are] called nonjusticiable." *Id.*

75. GEORGE F. WHARTON, LEGAL MAXIMS, WITH OBSERVATIONS AND CASES 101-02 (3d ed. 1903).

76. *Id.* "Nemo debet ease judex in propriâ causâ." *Id.*

77. *Id.* at 101.

78. Theodore F. T. Plucknett, *Bonham's Case and Judicial Review*, HARV. L. REV. 30, 34 (1926) (discussing the holding in Dr. Bonham's Case, (1609) 77 Eng. Rep. 646 (K.B.).

79. *Id.* Thomas Bonham, a Doctor of Medicine of the University of Cambridge, was called before the President and Censors of the Royal College of Physicians who found Dr. Bonham deficient to practice medicine and fined him one hundred shillings. *Id.* at 32. Bonham continued to practice and the Royal College continued to sanction him. *Id.* Bonham was eventually imprisoned by order of the Royal College, and he challenged the authority of the college. *Id.*

case in which he had rented property to the plaintiff and the plaintiff sued to gain rights to that same piece of property.[80] Coke stated that "[w]hen a judge has an interest, neither he nor his deputy can determine a cause; and if he does, a prohibition lies."[81] A later case in 1742 went as far as extending this maxim to hold that a justice of the peace could not remove a destitute man from his own community because of the justice's status as an interested party.[82] At common law, however, personal bias or prejudices alone were not reasons for judicial disqualification.[83]

B. The Due Process Clause of the United States Constitution

1. A Pecuniary Interest in the Outcome of the Case

The *Caperton* court, in reaching its decision, relied heavily on the Court's prior decisions involving two distinct situations where the Due Process Clause had required disqualification.[84] The first situation involved cases where a judge had a pecuniary interest in deciding a particular case a certain way.[85] In 1927, in *Tumey v. Ohio*, the Supreme Court of the United States addressed the issue of whether a mayor, who acted as judge in a case in which he had a financial incentive to find the accused guilty, violated due process.[86] In the case, an Ohio statute provided that a mayor may act as the judge in cases involving violations of the law which forbid the possession of alcohol.[87] The village of North College Hill passed an ordinance pursuant to that statute, which provided that upon a conviction the mayor would receive a portion of the fees assessed as payment for his service, with the remainder distributed to help enforce the law.[88] However, if the mayor did not

80. Earl of Derby's Case, (1614) 77 Eng. Rep. 1390 (K.B.). Sir John Egerton brought an action against Willaim Earl of Derby, Chamberlain of Chester, and others, for the "trust and interest of a farm called Budshaw," where Chamberlain of Chester was the only Judge in Equity who heard the case. *Id.*

81. *Id.*

82. Between the Parishes of Great Charte & Kennington, (1742) 93 Eng. Rep. 1107 (K.B.)

83. *Caperton*, 129 S. Ct. at 2259. Historically, the legislatures determined the grounds for disqualification of a judge in the United States. *Id.*

84. *Id.*

85. *Id.*

86. *Tumey*, 273 U.S. at 514.

87. *Id.* at 517.

88. *Id.* at 517-19.

convict a defendant and the court did not asses any fees, then the mayor/judge received no payment for his service.[89]

The *Tumey* Court noted that most issues regarding disqualification of a judge do not implicate the Constitution, and "matters of kinship, personal bias, state policy, [and] remoteness of interest" are issues better left to the legislature.[90] The Court did find, however, that a Fourteenth Amendment Due Process Clause violation would occur when and if the judge had a "direct, personal, substantial pecuniary interest in reaching a conclusion against [the accused]."[91] In addressing older cases and legislation, the Court noticed that throughout history judges have often received payment through fines and fees, but never contingent on a finding of guilt.[92]

The Court in *Tumey* held that a procedure which presents an opportunity for a reasonable judge to not "hold the balance nice, clear, and true" denies a litigant the due process of law.[93] In this case, the mayor/judge had a financial responsibility not only to himself but also to the city.[94] With the judge's financial interests in mind, the accused could have concluded that he may not receive a fair trial.[95] Therefore, the judge should have disqualified himself before considering any of the evidence against the accused, and his failure to do so violated the due process rights of the accused.[96]

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89. *Id* at 520.

90. *Id.* at 522.

91. *Tumey*, 273 U.S. at 522. The Fourteenth Amendment to the United State Constitution asserts that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

92. *Id.* at 524-26. The court traced the history from the common law of England before the colonies broke away from the mainland. *Id.* at 524. "As early as 12 Richard II, A. D. 1388, it was provided that there should be a commission of the justices of the peace . . . should receive four shillings a day . . . out of a fund made up of fines . . . ." *Id.*

93. *Id.* at 532. The rule was stated as:

> [T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Id.

94. *Id.* From May 11, 1923 to December 31, 1923 the fines collected totaled more than $20,000, of which the village received $4,471.25 for general use, the state received $8,992.50, $2,697.25 went into a village safety fund, and the remainder went into the enforcement fund of which the mayor received $696.35. *Id.* at 521.

95. *Id.* at 533.

96. *Tumey*, 273 U.S. at 535. The last argument made by the State was that the evidence showed the defendant was "clearly guilty" and was only fined the minimum of $100. *Id.*

Almost fifty years after *Tumey*, the Court addressed this same matter in *Ward v. Village of Monroeville.*[97] *Ward* had similar facts to those in *Tumey*, except that the mayor/judge's wage in *Ward* did not depend upon a finding of guilt and a procedural safeguard existed so that a defendant could easily appeal.[98] A substantial amount of the village's income, however, came from the fees and fines.[99] The Court, looking to the holding from *Tumey,* found that receiving a salary based on convictions was not determinative of that case.[100] Rather, the outcome resulted from the facts presenting a situation in which a reasonable person "[could] not hold the balance nice, clear, and true."[101]

In *Ward*, the Court determined that the Ohio mayor had a concern in the financial interests of the village, especially due to the rather substantial amount attributed to the fines.[102] Therefore, the law violated the due process rights of the accused because the mayor/judge might rule against him based on his financial interest in the case.[103] Finally, the Court concluded that the appeal procedure did not sufficiently protect a person's due process rights.[104] The due process violation occurred as a result of the incentive to convict during trial; therefore, it did not matter that an appeal could fix the bias after trial.[105]

Shortly thereafter, the Supreme Court expanded upon this principle to non-trial events when it addressed the issue concerning whether a due process violation occurred when a justice of the peace received payment for issuing a search warrant.[106] In *Connally v. Georgia,* the justice received a minimal amount, five dollars, for issuing a warrant, but he did not receive any compensation if he denied the warrant.[107] The Court found that this proce-

97. Ward v. Village of Monroeville, 409 U.S. 57 (1972).

98. *Ward*, 409 U.S. at 60-61.

99. *Id.* at 59. In 1964, the village had a total revenue of $46,355.38, of which, $23,589.50 came from income produced by fees and fines imposed by the mayor. *Id.* at 58. In 1968, of the $52,995.95 total revenue, $23,439.42 came from the fees and fines. *Id.*

100. *Id.* at 60.

101. *Id.* (citing *Tumey*, 273 U.S. at 532).

102. *Id.*

103. *Ward*, 409 U.S. at 60.

104. *Id.* at 61. The village argued that any bias could be fixed because the law allowed an appeal and trial de novo in the "County Court of Common Pleas." *Id.* Trial de novo is defined as "[a] new trial on the entire case – that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance." BLACK'S LAW DICTIONARY 1654 (9th ed. 2009).

105. *Id.*

106. Connally v. Georgia, 429 U.S. 245 (1977).

107. *Connally*, 429 U.S. at 246.

dure violated due process, despite the nominal amount of money involved, because the justice received a financial award for taking some action, but received nothing for inaction."[108]

The Supreme Court further articulated when a pecuniary interest required recusal in *Aetna Life Insurance Co. v. Lavoie*.[109] There, the Court dealt with the issue of whether a member of the Alabama Supreme Court, Justice Embry, violated a party's due process rights by not recusing himself from hearing a claim that was nearly identical to two claims that he was a party to in a lower court.[110] Bad faith payment by an insurance company was the basis of the claim.[111] The issue that ultimately determined the outcome of the case was whether partial payment would dismiss the entire claim.[112] If the insurance company lost the case, then the Justice's claim in the lower court would likely succeed.[113]

In a five-to-four decision, the Alabama Supreme Court affirmed a jury award for $3.5 million against the insurance company, with Justice Embry joining the majority.[114] The insurance company moved for the justices of the court to recuse themselves because they were all potential members of Justice Embry's suit, and to allow a rehearing because of Justice Embry's involvement.[115] The justices denied the motions.[116] After the insurance company appealed to the United States Supreme Court, Justice Embry settled his personal claims for $30,000.[117]

On appeal, the United States Supreme Court did not find that the Justice's hostility towards insurance companies required disqualification.[118] The Court, again relying on *Tumey*, held that situations where the judge has a "direct, personal, substantial, pecuniary interest" in the outcome of the case violate the Fourteenth

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108. *Id.* at 250.

109. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1985).

110. *Lavoie*, 475 U.S. at 815. The Justice had filed two "bad-faith failure to pay" claims in the Circuit Court for Jefferson County, Alabama. *Id.* at 817.

111. *Id.* at 816-17.

112. *Id.*

113. *Id.* at 822.

114. *Id.* at 816.

115. *Lavoie*, 475 U.S. at 817.

116. *Id.* at 817-18.

117. *Id.* Justice Embry settled with Blue Cross for $30,000 but his claim against another insurance company, Maryland Casualty Company, was settled earlier by paying his claim. *Id.* at 819.

118. *Id.* at 820. According to a transcript from Justice Embry's deposition, he indicated frustration with insurance companies, and when asked a question regarding if he has ever had trouble making insurance claims, he responded with "[t]hat is a silly question. For years and years." *Id.* at 818.

Amendment Due Process Clause.[119] The Court found that the Justice did have such an interest in the outcome of this case.[120] The Justice not only heard the case, but decided it in such a way that benefited his personal claims.[121] Therefore, the Court concluded that the insurance company's due process rights had been violated.[122] The Court did not base its ruling on a finding of actual bias, but because the situation "would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear, and true."[123] The Court articulated that it is the "appearance of justice" that is required to satisfy a party's due process rights.[124]

2. *Personal Involvement in a Prior Proceeding*

In *Caperton*, the Court also relied on instances where a judge had been involved in the prior proceeding and became personally implicated in the matter.[125] This rule in the United States, without specifically relying on due process, dates back to the 1925 decision of *Cooke v. United States*.[126] At issue in the case was if a personal letter, asking for the judge's removal, written to the judge after the verdict had been entered, was contemptuous.[127] After the Court addressed the contempt issue, it remarked that when possible, a judge who suffers a personal attack, which leads to a charge of contempt, should ask another judge to take his place and preside over the contempt charge.[128] The judge's emotional involvement, which would not allow for the partiality and composure necessary in decision-making, necessitated his replacement.[129]

The Supreme Court, in 1955, determined whether a judge acting as a single-person grand jury, who then charged and convicted the

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119. *Id.* at 824 (quoting *Tumey*, 273 U.S. at 523).
120. *Lavoie*, 475 U.S. at 824.
121. *Id.*
122. *Id.*
123. *Id.* at 825 (quoting *Tumey*, 273 U.S. at 532).
124. *Id.* (quoting *In re Murchison*, 349 U.S. at 136). *See supra* notes 119-124; *infra* notes 126-29.
125. *Caperton*, 129 S. Ct. at 2261. Contempt is defined as "[c]onduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable, usu[ally] by fine or imprisonment." BLACK'S LAW DICTIONARY 360 (9th ed. 2009).
126. Cooke v. United States, 267 U.S. 517 (1925).
127. *Cooke*, 267 U.S. at 532.
128. *Id.* at 539.
129. *Id.*

man for contempt at trial, violated that person's due process rights, in *In re Murchison.*[130] In *Murchison,* Michigan law allowed a judge to act as a single-person grand jury.[131] Murchison and White testified before a one-judge grand jury and had to answer questions related to gambling and bribery.[132] The judge did not find Murchison's answers truthful, and White refused to answer without a lawyer present.[133] The judge subsequently charged them both with contempt and required them to appear in court to defend against the charges.[134] The judge tried the men in open court, and he found them guilty of contempt.[135]

In *Murchison,* the Court held that a "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases."[136] The Supreme Court reasoned that the judge in this case essentially acted as a grand jury and performed an investigation into the matter, and then he tried the person as a result of his own investigation.[137] Justice Black held that a judge could not remove himself from what he discovered during a grand jury proceeding.[138] Therefore, Justice Black concluded that when the same judge who charged a man with contempt, proceeded to try him for that charge, violated due process.[139] Again, the Court focused on "the appearance of justice," rather than actual bias.[140]

In 1971, in *Mayberry v. Pennsylvania,*[141] the Supreme Court had to determine whether a judge holding a man in contempt of court and then proceeding to sentence the man for that charge violated due process.[142] During the trial for a prison breach and holding hostages, Mayberry, who represented himself, repeatedly insulted the judge and the court.[143] Prior to the sentencing for the criminal

130. In re Murchison, 349 U.S. 133 (1955).

131. *Murchison,* 349 U.S. at 133. MICH. COMP. LAWS § 767.3-4 (1948). Michigan law also forbade any judge who conducted one of these grand-juries from trying any case or related filing that may arise from the inquiry. *Id.* at 135.

132. *Id.* at 134. Murchison was a Detroit policeman. *Id.*

133. *Id.* at 135.

134. *Id.* at 134-35.

135. *Id.* at 135.

136. *Murchison,* 349 U.S. at 136.

137. *Id.* at 137.

138. *Id.*

139. *Id.*

140. *Id.* at 136 (citing Offutt v. United States, 348 U.S. 11, 14 (1954)).

141. 400 U.S. 455 (1971).

142. *Mayberry,* 400 U.S. at 455.

143. *Id.* at 456-62. Mayberry and two other co-defendants were charged with the same crimes. *Id.* at 455. They all choose to represent themselves despite being appointed counsel. *Id.* The most offensive of the insults aimed at the judge included "dirty sonofabitch,"

charges, the judge found Mayberry guilty of criminal contempt and then sentenced him for that charge.[144]

The Supreme Court concluded that a judge should neither acknowledge a parties' attack, nor even reply to it, because any response by the judge would not satisfy the "appearance of justice."[145] Here, the judge had suffered very personal attacks and would not likely have been able to remain separated from the case in a way to properly administer justice.[146] The Court held that the Due Process Clause requires a different judge, other than the judge who accused a person of contempt, to find guilt.[147]

In *Taylor v. Hayes*,[148] the Supreme Court further determined that a different judge, rather than the judge who charged the man, should preside at the rehearing for petty criminal contempt charges.[149] There, the Court decided whether a person charged with contempt of court should be given a jury trial, and whether the defendant's due process rights had been violated by not being given an opportunity to be heard.[150] Justice White found that a jury trial was not required, but the defendant's due process rights had been violated by not being afforded an opportunity to respond to the contempt charges.[151] Justice White further held that if the court gave the man a new trial, the retrial should not be heard by the same judge because it is unlikely that the judge could maintain a "calm detachment."[152]

3. The "Appearance" of Bias

The Fourth Circuit addressed the issue of "appearance" of bias in *Aiken County v. BSP Div. of Envirotech Corp.*[153] Here, the court determined if two ex parte contacts, concerning scheduling of a meeting and a memorandum request to the judge, which occurred

"dirty tyrannical old dog," and "fool." *Id.* at 466. Other insults included "stumbling dog," the judge was accused of running a "Spanish Inquisition," and was told "to go to hell," and to "[k]eep [his] mouth shut." *Id.*

144. *Id.* at 463. The court stated the contempt charge as follows: "On December 9, 1966, you have constantly, boisterously, and insolently interrupted the Court during its attempts to charge the jury, thereby creating an atmosphere of utter confusion and chaos." *Id.* at 462.

145. *Id.* at 465 (quoting *Offutt*, 348 U.S. at 14.)

146. *Id.*

147. *Mayberry*, 400 U.S. at 466.

148. Taylor v. Hayes, 418 U.S. 488 (1974).

149. *Taylor*, 418 U.S. at 488.

150. *Id.* at 495.

151. *Id.* at 499.

152. *Id.* at 501.

153. 866 F.2d 661 (4th Cir. 1989).

without notice to the other party, violated due process.[154] The Court held that due process protects against even an "appearance of bias," but the communications at issue here did not rise to an unconstitutional level.[155]

To the contrary, the Third Circuit has held that "bad appearances" alone do not require disqualification.[156] In *Johnson v. Carroll*,[157] a judge spoke with an ex-prosecutor at a social event in which the ex-prosecutor told the judge of certain prior bad acts of a man who the judge was to sentence.[158] Subsequently, the judge sentenced the man and claimed he was not biased because of the statements communicated to him at the party.[159] The Third Circuit held that due process had not been violated even if the court assumed that there was an appearance of bias.[160]

The Fifth Circuit has also held that judicial disqualification, as mandated by due process, did not extend to a mere "appearance" of bias in *Richardson v. Quaterman*.[161] Here, the defendant was charged with the murder of his wife, who was an acquaintance of the judge's wife.[162] The Circuit Court held that, because the case was not similar to any prior United States Supreme Court case, "appearance of bias" in this situation did not require recusal.[163]

4. Campaign Contributions

The Supreme Court of Oklahoma, in 2001, addressed the issue of whether a trial judge should be disqualified from hearing a divorce proceeding because the judge accepted campaign contributions from the husband while the case pended trial.[164] In *Pierce v. Pierce*,[165] while the divorce case awaited trial, the husband and his father each donated five thousand dollars to the judge's political

154. *Aiken*, 866 F.2d at 677-78.
155. *Id.*
156. Johnson v. Carroll, 369 F.3d 253 (3d Cir. 2004).
157. *Johnson*, 369 F.3d at 253.
158. *Id.* at 254.
159. *Id.*
160. *Id.* at 259.
161. 537 F.3d 466 (5th Cir. 2008).
162. *Richardson*, 537 F.3d at 468. The victim and the judge's wife both belonged to the Junior League of Dallas, a women's volunteer organization. *Id.* at 468-69.
163. *Id.* at 476. The Circuit Court recognized only three situations where due process required recusal: 1) when the judge has a pecuniary interest in the outcome of the case; 2) when the judge has been a target of personal abuse or criticism; 3) and when the judge also acts as investigator. *Id.* at 475.
164. Pierce v. Pierce, 39 P.3d 791, 793 (Okla. Civ. App. 2001).
165. *Pierce*, 39 P.3d at 791.

campaign.[166] The husband allegedly informed his wife that she would not win in the custody dispute for her minor child, to which she then requested the judge's recusal.[167] The Supreme Court of Oklahoma held that due process includes "the right to a trial without the appearance of judge partiality arising from counsel's campaign contributions and solicitation of campaign contributions on behalf of a judge during a case pending before the judge."[168]

IV. HOW THE SUPREME COURT CORRECTLY CLARIFIED THE DUE PROCESS CLAUSE AND CREATED A "PROBABILITY OF BIAS" STANDARD

At common law, only when a judge had a monetary interest in the outcome of the case did it require judicial disqualification.[169] Over time, courts held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution incorporated this same principle,[170] and also courts have extended due process to those situations where a judge may be biased by what had occurred in a prior court proceeding.[171] The Supreme Court in *Caperton* has once again clarified due process and required disqualification based on an objective probability of bias where a party to a case donated a substantial amount of money to a judge's political campaign.[172] The Court looked to those past situations in which due process had required judicial disqualification and correctly determined that there should be an overall "probability of actual bias"[173] standard.

A. Actual Bias" was Never the Test

Massey had argued that an appearance, or probability, of impropriety could never rise to an unconstitutional level; rather, there needs to be evidence of actual bias.[174] However, in prior case law, the Court had at least hinted at, if not actually used, a test based on probability and appearance of impropriety. Perhaps the most prominent case demonstrating this principle was *Lavoie,* in

166. *Id.* at 793.
167. *Id.*
168. *Id.* at 799.
169. *See supra* notes 75-83.
170. *See supra* notes 86-96.
171. *See supra* notes 127-131.
172. *Caperton*, 129 S. Ct. at 2252.
173. *Id.* at 2257.
174. Brief for Respondents at 15, *Caperton*, 129 S. Ct. 2252 (2009) (No. 08-22).

which the Court held that due process required recusal when the "situation was one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."[175] This same "temptation" was present in *Murchison* where the judge criminally charged a man with contempt, and then proceeded to be the judge over that charge.[176] In both of those instances, the Court did not rely on a finding of actual bias. The Court relied on an appearance of bias, even if it may have labeled it differently. The majority, therefore, properly held that because the standard needed to be based on objective observations, a probability test was appropriate. Using that objective test, the Court correctly found that the support given to Justice Benjamin's campaign, because of its extreme nature, required his disqualification. The "possible temptation," that was present in *Lavoie* and *Murchison*, was also present in *Caperton*.

Basing violations of due process rights solely on an actual finding of bias would have been detrimental to the fundamental right of a fair trial. The Court has continually held that "a fair trial in a fair tribunal is a basic requirement of due process."[177] If the standard was not based on objective determinations, how could a litigant determine if a judge was "actually biased"? What evidence could a party use to make this determination? Throughout history, disqualification only required a slight showing of some pecuniary interest.[178] Financial impact on the judge in those cases was the only way to prove an actual bias, other than an admittance of bias by the judge. In *Caperton*, Justice Benjamin searched within for bias, but found none.[179] Without questioning the Justice's honesty, clearly there is no way to know for sure how he reached his decision. "[T]here may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding a case" without an objective test.[180]

B. The Future of Judicial Disqualification

A final argument against using a "probability" standard was how it would affect the future of judicial disqualification.[181] The

175. *Lavoie*, 475 U.S. 822.
176. *Murchison*, 349 U.S. 133.
177. *Id.* at 136.
178. *See supra* note 76.
179. *Caperton*, 129 U.S. at 2263.
180. *Id.*
181. *Id.* at 2266.

prior disqualification cases, as pointed out by the majority in *Caperton*, did not beget a rush of recusal motions.[182] The majority correctly reasoned that because of the extreme facts and unusual circumstances, there would be few questions as to when this new standard would apply, and how lower courts should apply it. After all, in the past the "courts proved quite capable of applying the standards to less extreme situations."[183]

V. HOW THE SUPREME COURT ERRED IN NOT SUFFICIENTLY CLARIFYING ITS HOLDING

Despite the Court reaching the correct holding, the Court should have clarified it sufficiently to allow future determinations as to when it should apply. In *Caperton,* the Court determined that the "probability of bias" standard should be used in the context of contributions to judicial campaigns. Without making clear that it should only apply to these situations, the Court has left open numerous circumstances which may need further clarification at a later time. This standard may apply to situations where the judge has any pecuniary interest in the outcome of the case, despite the common law rule that has been effective in the past. In these situations, the courts should still require disqualification in any circumstance where the judge may have the slightest pecuniary interest. Situations involving "friendship with a party or lawyer, prior employment experience," as well as numerous others may also proffer an appearance of bias.[184] A probability of bias standard may require judicial disqualification under some, if not all, of those circumstances, based merely on appearances. The holding in *Caperton*, therefore, should be narrowly applied only to campaign contribution cases.

If the courts believe that this standard should apply to any judicial situation then there could be countless unwanted effects. Imagine the United States legal system without *Marbury v. Madison.*[185] There, Justice John Marshall was the United States Secretary of State prior to becoming a justice on the Supreme Court.[186] It was John Marshall's failure to deliver several federal judicial appointments, under his capacity of Secretary, which lead to the

182. *Id.*
183. *Caperton*, 129 S. Ct. at 2266.
184. *Id.* at 2268. (Roberts, C.J., dissenting).
185. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
186. Brief for Respondents, *supra* note 171, at 26.

suit being brought to the Supreme Court.[187] Under the probability of bias standard, due process would most likely have required John Marshall's recusal, which would have substantially changed the entire judicial system and judicial review.

VI. THE CODE OF JUDICIAL CONDUCT

Prior to *Caperton*, the Supreme Court had never held that judicial campaign contributions ever violated due process, and typically left those matters to the legislatures. The legislature of West Virginia enacted legislation to address appearances of judicial bias. West Virginia enacted a Code of Judicial Conduct similar to that of the American Bar Association ("ABA") Model Code.[188] West Virginia's code, Canon 2A provided that "[a] Judge shall . . . avoid impropriety and the appearance of impropriety in all of the judge's activities."[189] Furthermore, Canon 3E provided that a judge "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[190] The enforcement of this code is provided through the Judicial Investigation Commission,[191] and matters are investigated upon the issuance of a complaint.[192] If found that a judge acted in violation of the code, the Commission is allowed to enter any of the following sanctions: admonishment, reprimand, censure, suspension without pay for up to one year, a fine of up to $5,000, or involuntary retirement.[193] Almost every state adopted a similar code for judicial conduct based on the ABA model.[194]

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187. *Id.*

188. The ABA Model Code of *Judicial* Conduct in Canon 2, Rule 2.11(A) states:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> (1) The judge has a personal bias of prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
>
> . . . .
>
> (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

MODEL CODE OF JUD. CONDUCT Canon 2 (2007).

189. W. VA. CODE OF JUD. CONDUCT Canon 2 (1993).

190. W. VA. CODE OF JUD. CONDUCT Canon 3E (1993).

191. W. VA. R. OF JUD. DISC. PROC. 1 (1994).

192. W. VA. R. OF JUD. DISC. PROC. 2 (1994).

193. W. VA. R. OF JUD. DISC. PROC. 4.12 (1994).

194. *Caperton*, 129 S. Ct. at 2266.

Despite this code of conduct being enacted in West Virginia at the time, it did not require Justice Benjamin to recuse himself from the case. This may have been due to the legislature's failure to keep up with the rapidly changing judicial campaign contribution trends. The *ABA Model Code* adapted to these changes in 1999, but West Virginia still operated under the older 1990 version.[195] As of 2009, only Alabama and Mississippi adopted the new ABA model and required disqualification when a judge received election campaign contributions over a certain amount.[196]

Due to the inability of the West Virginia legislature to keep up with the political trends, and the recent changes to the *ABA Model Code*, the Supreme Court properly asserted that it was essential to determine under which circumstances due process required disqualification, thereby creating a "constitutional floor."[197] Without question, Congress and state legislatures are always free to extend the protections further, thereby making them more laborious than the standards mandated by the Court under the Due Process Clause.[198]

VII. CONCLUSION

Considering all of the circumstances, the Court correctly found a due process violation. This issue, because of the large sum of money involved, was extreme, and yet the Code of Judicial Conduct did not prevent it from occurring. To prevent future occurrences there needed to be a constitutional restraint and the proper vehicle was the Due Process Clause. Although the West Virginia Code should have prevented such an appearance of bias, there are times, as here, when statutes fail to correct these instances. It is only in these situations where the due process analysis should be used. Most often, the cases that are unconstitutional are atypical,

195. Brief of the American Bar Association at 13, Caperton v. A.T. Massey Coal Co., Inc, 129 S. Ct. 2252 (2009) (No. 08-22).

196. *Id.* at 14. *See supra* note 186 and accompanying text. The Alabama code requires recusal of a justice or judge of an appellate court when he receives more than $4,000 towards his campaign, or a circuit judge who receives more than $2,000. ALA. CODE § 12-24-2 (2006). The Mississippi Code does not permit more than $5,000 contributions to political campaigns in appellate court races, and $2,500 in lower court races. MISS. CODE ANN. § 23-15-1021 (2000).

197. *Caperton*, 129 S. Ct. at 2267.

198. *Id.* (quoting *Lavoie*, 475 U.S. at 828).

and it is in these cases where the Court must develop unbiased criterion.[199]

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199. *Id.* at 2265. "[E]xtreme cases are more likely to cross constitutional limits requiring the Court's intervention and formulation of objective standards." *Id.*